# SEMINOLE TRIBE OF FLORIDA

TELEPHONE
(954) 967-3950

FAX
(954) 967-3487

WEBSITE
www.seminoletribe.com

6300 STIRLING ROAD
HOLLYWOOD, FLORIDA 33024



JIM SHORE
General Counsel

November 13, 2006

Via Fax and First Class Mail

Philip Hogen, Chairman
National Indian Gaming Commission
1441 L St., N.W., Suite 9100
Washington, D.C. 20005

Re: Comments on Electronic or Electromechanical Facsimile Definition (71 Fed. Reg. 30,232 (May 25, 2006)); Comments on Class II Classification Standards (71 Fed. Reg. 30,238 (May 25, 2006)); and Comments on Technical Standards (71 Fed. Reg. 46,336 (August 11, 2006)

Dear Chairman Hogen:

Enclosed please find the comments of the Seminole Tribe of Florida ("Tribe") on the National Indian Gaming Commission's ("NIGC") proposed Class II Classification Regulations (71 Fed. Reg. 30,238 (May 25, 2006) and 71 Fed. Reg. 30,232 (May 25, 2006)) and the proposed Technical Standards (71 Fed. Reg. 46,336 (August 11, 2006)). As detailed below, the proposed regulations are fundamentally flawed. The Tribe respectfully urges the Commission to withdraw the proposed regulations, which are contrary to the Indian Gaming Regulatory Act ("IGRA"), case law and prior decisions by the Commission. The Tribe urges the Commission to take a fresh look at the classification issue after completing work on reasonable technical standards regulations.

We note at the outset that the conclusions found in the November 3. 2006 independent study by Alan Meister, which was commissioned by the NIGC and published on its website on November 6, 2006, broadly affirms the universal tribal position that adoption of these regulations would have a severe economic impact on class II gaming operations conducted by tribes. That adverse effect would be even greater in the case of the Tribe because it is already in the situation where it is forced to compete against slot machine operations of various pari-mutuel facilities. While the Tribe hopes and expects to receive Secretarial Procedures in the near future, they have not yet been issued and, when issued will not be effective until the State of Florida's challenge to

the Procedures Regulations has been reviewed by the federal district court for the Northern District of Florida.

Background

The Tribe has been a leader in the area of Indian gaming. The Tribe was the first tribe to open a commercial high stakes bingo hall and has been conducting gaming to provide revenue for tribal programs for over 25 years. Although the Tribe has the undisputed right to offer slot machines since slot machines are expressly permitted under state law, the Tribe has been limited to Class II gaming due to the failure of the State and the federal government to follow governing federal law by refusing to compact or issue procedures in lieu of a compact.

Since the Tribe has been forced by the State and the federal government to rely on Class II gaming, the Tribe has, of necessity, worked with the gaming industry to maximize the commercial viability of Class II gaming. The Tribe also has been a leader in helping to promote standards to ensure game integrity and compatibility between games and related back office systems. For these reasons, both the Tribe was encouraged when, in 2003, the NIGC announced plans to develop common technical standards for Class II games. The Tribe was further encouraged when Charles Lombardo, a tribal employee with extensive experience in the gaming industry, was named by the NIGC as one of the seven tribal representatives on a tribal advisory committee to work with the Commission to develop these regulations.

The Tribe was disappointed and surprised when the NIGC went forward with the proposed regulations in a manner that was completely contrary to the advice of Mr. Lombardo and the other tribal representatives on the advisory committee. The Tribe is advised that the members of the advisory committee frequently and usually unanimously objected to the language developed by the NIGC. Yet, not one of the significant comments made by Mr. Lombardo or the other members of the advisory committee was accepted by the NIGC. In fact, the advisory committee had no role in the actual drafting of the proposed classification regulations.

The Tribe agrees that there needs to be a clear line between Class II and Class III. However, that the line was drawn by Congress and that there is no need or basis for the NIGC to draw a different and more restrictive line. In the case of bingo, there is a simple test:

1. The game must meet the three IGRA requirements for bingo.
2. If the underlying game is bingo, then it can be played with electronic aids as long as the aids do not make the game into a "facsimile" by permitting a player to play the game with or against a machine rather than with or against other players.

Applying this test is very simple. Tribes are free to use technology (including auto-daub) to aid in the play of bingo and other Class II games, as long as the aid does not permit the player to play alone with or against the machine. Granted, this gives tribes a great deal of flexibility in game design, but that is what Congress intended.

In contrast, the NIGC's proposed regulations would impose numerous additional and arbitrary requirements on what it takes for a game to be bingo and on the types of electronic aids that can be used to play bingo. The games that would be permitted under the proposed regulations would be extraordinarily expensive to produce and would have little, if any, commercial viability. The present major manufactures of these games have indicated that they may abandon this platform and exit the Class II gaming market if the proposed regulations are promulgated in anything like their present form.

The proposed regulations, by dramatically restricting Class II gaming, also would be very unfair to tribes in states such as Florida, where the tribes are forced to compete with Class II games against Class III games permitted under state law. By denying Class III gaming to the tribes, the states are able to generate significant tax revenue from the non-Indian gaming, while largely leaving the tribes out in the cold. It is hard to believe that Congress intended such a situation when it passed the IGRA. Unless restricted by the NIGC, Class II gaming gives tribes some ability to stay competitive and hopefully encourage the states to come to the negotiating table.

In addition to these considerations, the Tribe understands from comments made by you at the Hearing held in Washington D.C. on Tuesday, September 19, that the Department of Justice has not yet cleared the proposed regulations. You also agreed that tribes fully complying with these proposed regulations could still face civil enforcement actions or even criminal proceedings by the Department of Justice. Given these facts, the certainty the regulations are purportedly designed to achieve cannot be achieved. The bright line the regulations are supposed to create between Class II and Class III gaming will continue to be blurred by the machinations of the Department of Justice, which has long been hostile to Indian gaming in all its forms. The Tribe submits that promulgation of these regulations would lead to major litigation about their validity and, if upheld by the courts, continued questions about the kind of games that can be lawfully used by Tribes.

There is one final general point that we urge you to consider. At the September 19 Hearing you stated your belief that proceeding with the regulations was in the best interest of tribes. You indicated that the games tribes were operating had to be cut back or tribes would face danger in the future from congressional or judicial action that would, in effect, destroy the viability of Class II electronically assisted gaming. While the Tribe has no doubt of your good intentions, the cure you suggest would be worse than the dangers you point out. The Tribe believes, as does every tribe which has commented on these proposals, that their adoption would make Class II electronically assisted gaming no longer economically viable. In these circumstances, the Tribe would rather face the uncertainty of adverse action by Congress and the courts in the future, than suffer the certain loss that adoption of these regulations would cause it.

For these reasons and the reasons detailed below, the Tribe calls on the NIGC to withdraw its proposed regulations.

1. Comments on Proposed New Definition for "Electronic or Electromechanical Facsimile."

The Tribe strongly objects to the NIGC's proposal to amend the definition of "Electronic or Electromechanical Facsimile" found at 25 C.F.R. 502.8.[1] According to the NIGC, this change is necessary to "make[] clear that all games including bingo, lotto and 'other games similar to bingo,' when played in an electronic medium, are facsimiles when they incorporate all of the fundamental characteristics of the game." 71 Fed. Reg. 30,234.[2] This proposed change fails to

---

[1] The present rule, adopted in 2002, provides the following definition:

> Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

The proposed rule would change the definition to the following:

> (a) Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating the fundamental characteristics of the game.
>
> (b) Bingo, lotto, and other games similar to bingo are facsimiles when:
>
> (1) The electronic or electromechanical format replicates a game of chance by incorporating all of the fundamental characteristics of the game, or
>
> (2) An element of the game's format allows players to play with or against a machine rather than broadening participation among competing players. (Emphasis added.)

[2] As an initial matter, it is not clear from the proposal which characteristics are "fundamental" and what it means to "incorporate" a characteristic into an electronic format. If

recognize that both the legislative history of IGRA and case law indicate that the relevant test for facsimile is not whether the game is played in an electronic format, but whether the electronic format changes the fundamental characteristics of the Class II game by permitting a player to play alone with or against the machine.

The IGRA provides that Class II gaming does not include "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind," 25 U.S.C. 2703(7)(B)(ii), however, the term "facsimile" is not defined by the statute. The legislative history suggests that Congress did not intend the facsimile prohibition to restrict the use of electronics to play bingo games. Instead, the term facsimile was used as shorthand for games where, unlike true bingo games, the player plays only with or against the machine and not with or against other players. As explained in the Senate Report:

> The Committee specifically rejects any inference that tribes should restrict class II games to existing games [sic] sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

S. Rep. No. 100-446 at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079 (emphasis added).

---

anything, this change to the definition of facsimile further confuses the distinction between Class II and Class III.

In other words, the use of technology, even if it allows fundamental characteristics of bingo to be played in an electronic format, does not necessarily make a bingo game a "facsimile." Rather, a bingo game played using technologic aids (which are expressly permitted by 25 U.S.C. 2703(7)(A)(i)), only becomes a facsimile if the technology permits the player to play "with or against a machine rather than with or against other players."

The courts have agreed with this interpretation. In the MegaMania cases, the courts ruled that MegaMania is not an exact copy or duplicate of bingo and thus not a facsimile because the game of bingo is not wholly incorporated into the player station; rather, the game of bingo is independent from the player station, so that the players are competing against other players in the same bingo game and are not simply playing against the machine. See United States v. 103 Electronic Gambling Devices, 223 F.3d 1091, 1100 (9th Cir. 2000); United States v. 162 MegaMania Gambling Devices, 231 F.3d 713, 724 (10th Cir. 2000).[3] As drafted, the NIGC's proposed change to the definition of "facsimile" ignores this critical distinction and would unlawfully restrict the range of technologic aids available to tribes. There is no legal basis for

---

[3] The applicable test for distinguishing between aids and facsimiles was explained by the Tenth Circuit:

> Courts reviewing the legislative history of the Gaming Act have recognized an electronic, computer or technological aid must possess at least two characteristics: (1) the "aid" must operate to broaden the participation levels of participants in a common game, see Spokane Indian Tribe v. United States, 972 F.2d 1090, 1093 (9th Cir. 1992); and (2) **the "aid" is distinguishable from a "facsimile" where a single participant plays with or against a machine rather than with or against other players.** Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 304 U.S. App. D.C. 335, 14 F.3d 633, 636-37 (D.C. Cir.), cert. denied, 512 U.S. 1221, 129 L.Ed.2d 836, 114 S.Ct. 2709 (1994) (Cabazon III). Courts have adopted a plain-meaning interpretation of the term "facsimile" and recognized a facsimile of a game is one that replicates the characteristics of the underlying game. See Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 542 (9th Cir. 1994) ("the first dictionary definition of 'facsimile' is 'an exact and detailed copy of something.'" (quoting Webster's Third New Int'l Dictionary 813 (1976))), cert. denied, 516 U.S. 912, 133 L.Ed.2d 203, 116 S.Ct. 297 (1995); Cabazon II, 827 F. Supp. at 32 (same); Cabazon III, 14 F.3d at 636 (stating "[a]s commonly understood, facsimiles are exact copies, or duplicates.").

162 MegaMania Gambling Devices, 231 F.3d at 724 (emphasis added).

the NIGC to alter the current definition, which was adopted in 2002 for the express purpose of bringing the NIGC's previous definition of "facsimile" into compliance with case law.

2. Comments on Class II Classification Standards.

The NIGC proposal includes a comprehensive regulatory scheme in a new Part 546 for classifying and certifying Class II "games played with electronic components." Proposed 546.2. The proposed rule contains detailed requirements for such games and a process for approval by an NIGC-approved testing laboratory and the NIGC. Tribal gaming commissions have no meaningful role under this framework proposed by the NIGC, other than the ability to impose requirements in addition to those enumerated in the regulations. This is directly contrary to the IGRA, which specifies that tribes have the primary responsibility to "license and regulate ... class II gaming on Indian lands within such tribe's jurisdiction ... ." 25 U.S.C. 2710(b)(1).[4]

In addition, the substance of the proposed classification regulations would unlawfully restrict the range of Class II games available to tribes. The proposed rule would restrict tribes to "traditional" bingo and allow only minor variations for games similar to bingo.[5] It also would restrict the types of technologic aids available to tribes for Class II games.[6] Ironically, the proposal would use technology to restrict Class II gaming by requiring that Class II aids comply with arbitrary restrictions designed to slow game play, restrict prizes values and mandate levels of player participation and interaction with the aid device. This proposed language frustrates Congress's intent in adopting IGRA.

Congress intended to cast a wide net to allow tribes to offer an expansive range of game variations under the broad category of bingo by broadly defining bingo to mean any game that

---

[4] The NIGC also asserts jurisdiction over testing labs, which it does not have under the IGRA.

[5] In the preamble to the proposed regulations the Commission explains that it has decided to reject the view, expressed in the preamble to its 2002 regulations, that games similar to bingo are not required to meet all of the statutory requirements of bingo. As explained by the Commission in 2002, a game that meets all of the requirements of bingo would be bingo – not a game similar to bingo. According to the Commission, it was wrong in 2002 and even games similar to bingo must meet all of the statutory requirements for bingo. 71 Fed. Reg. 30,250. Only minor differences (the number of spaces on the card and the size of the ball draw) would be permitted for games similar to bingo, even though such games were previously recognized as "bingo." This dramatic change in position is, for the reasons expressed by the NIGC in 2002, illogical and contrary to the plain language of the IGRA.

[6] For example, the NIGC proposes to impose numerous arbitrary and unlawful limitations on the value of the game-winning prize, size of the ball draw, size of the bingo card, the number of releases of bingo numbers, the size of each release, the time period for each release, and the length of each daub period.

meets three basic requirements set out in the IGRA,. 25 U.S.C. 2703(7)(A)(i). In fact, Congress made clear that tribes could offer not just "bingo," but numerous related games – "pull-tabs, lotto, punch boards, tip jars, instant bingo, ... ." Id. Moreover, rather than stop with the enumerated list of games, Congress then went on to specify that tribes also could offer any "other games similar to bingo." Id. In short, Congress was not trying to limit tribes to a restrictive set of bingo-type games (such as only games with a 5x5 card and 75 numbers), but, consistent with the Supreme Court's ruling in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), to recognize that tribes were entitled to offer a very vast range of Class II games. As explained in the Senate Report, "Consistent with tribal rights that were recognized and affirmed in the Cabazon decision, the Committee intends ... that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development." S. Rep. No. 100-446 at 9. Further emphasizing the broad scope of Class II, Congress also explicitly stated that tribes could offer such games with "electronic, computer, or other technologic aids." 25 U.S.C. 2703(7)(A)(i).

The IGRA draws a bright line between Class II and Class III gaming, allowing tribes to play as Class II games a wide range of bingo and specified bingo-like games and permits electronics to be used in the play of such games, as long as the electronics do not allow a player to play alone with or against the device. In the case of bingo, the IGRA specifies the requirements for a game to qualify as Class II bingo. Thus, any game that meets the three IGRA classification requirements for bingo can be played with electronic aids as a Class II game, as long as the electronics are "readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players." S. Rep. No. 100-446 at 9. There is no basis, or more importantly authority, for the NIGC to impose additional classification requirements that are outside those set forth by Congress.

The courts have agreed with Congress' expansive reading of Class II. As explained by the Ninth Circuit:

> The Government's efforts to capture more completely the Platonic "essence" of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo.
>
> There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?

> Further, IGRA includes within its definition of bingo "pull-tabs, ... punch boards, tip jars, [and] instant bingo ... [if played in the same location as the game commonly known as bingo]," 25 U.S.C. § 2703(7)(A)(i), none of which are similar to the traditional numbered ball, multi-player, card-based game we played as children. ... Instant bingo, for example, is as the Fifth Circuit explained in *Julius M. Israel Lodge of B'nai B'rith No. 2113 v. Commissioner*, 98 F.3d 190 (5th Cir. 1996), a completely different creature from the classic straight-line game. Instead, instant bingo is a self-contained instant-win game that does not depend at all on balls drawn or numbers called by an external source. *See id.* at 192-93.
>
> Moreover, § 2703(7)(A)(i)'s definition of class II bingo includes "other games similar to bingo," 25 U.S.C. § 2703(7)(A)(i), explicitly precluding any reliance on the exact attributes of the children's pastime.

103 Electronic Gambling Devices, 223 F.3d at 1096. See also 162 MegaMania Gambling Devices, 231 F.3d at 723 ("While the speed, appearance and stakes associated with MegaMania are different from traditional, manual bingo, MegaMania meets all of the statutory criteria of a Class II game, as previously discussed.").

Nevertheless, the NIGC has crafted a regulatory scheme that fails to honor Congress' authorization for tribes to be able offer an expansive range of electronically-aided Class II games into a narrow authorization for a very limited form of electronic bingo. The end result is the creation by the NIGC of a new game that likely has never been played in any bingo hall at any time. Moreover, no electronic bingo game previously approved by the courts or the NIGC would satisfy these requirements. This clearly is not what Congress intended when it enacted the broad Class II provisions of the IGRA.

Significantly, it also is not how the NIGC has previously interpreted the IGRA. In the preamble to its 1992 definition regulations, the NIGC stated:

> [One] commenter suggested that class II gaming be limited to games involving group participation where all players play at the same time against each other for a common prize. In the view of the Commission, Congress enumerated those games that are classified as class II gaming (with the exception of "games similar to bingo"). Adding to the statutory criteria would serve to confuse rather than clarify. Therefore, the Commission rejected this suggestion.

> [Another] commenter questioned whether the definition of bingo in the IGRA limits the presentation of bingo to its classic form. The Commission does not believe Congress intended to limit bingo to its classic form. If it had, it could have spelled out further requirements such as cards having the letters "B" "I" "N" "G" "O" across the top, with numbers 1-15 in the first column, etc. In defining class II to include games similar to bingo, Congress intended to include more than "bingo in its classic form" in that class.
>
> ..... Congress enumerated the games that fall within class II except for games similar to bingo. For games similar to bingo, the Commission added a definition that includes the three criteria for bingo and, in addition, requires that the game not be a house banking game as defined in the regulations. The Commission believes that Congress did not intend other criteria to be used in classifying games in class II.

57 Fed. Reg. at 12382 - 12383, 12387 (1992).

In addition to our general objection to proposed classification standards, the Tribe offers the following non-exclusive list of specific objections.

**Section 546.2- -Scope**

According to the NIGC, the rule "is intended to address only games played with electronic components." The IGRA makes absolutely no distinction between "live session bingo" those "live" games played with linked player stations and an electronic ball draw. Both are live Class II bingo games. Thus, the limitations on bingo aids covered by Part 546 are artificial, arbitrary and appear to be designed to limit the profitability of such games to tribes.

**Section 546.3 - - Definitions**

The proposed section contains a number of arbitrary, and limiting, definitions for bingo, lotto, pull-tabs, instant bingo and other games similar to bingo, to which we object. These definitions are discussed below.

*Game.* Proposed section 546.3(a) unlawfully attempts to redefine the term "game" for bingo and other games similar to bingo, notwithstanding the fact that, as highlighted earlier, bingo is already defined by the IGRA. The three statutory requirements are the exclusive

requirements for bingo. The NIGC's proposed definition of "game" would impose requirements beyond those found in the IGRA definition of bingo and therefore would be unlawful.

*Lotto.* The proposed rule would define "lotto" to be a game "played in the same manner as the game of chance commonly known as bingo." Under this proposed definition, lotto would be defined out of existence as a separate Class II game. In interpreting the IGRA it is clear that Congress intended lotto to have a separate meaning since it is listed as a game separate from bingo.

*Sleep.* It appears that this definition has been added by the Commission to support its opposition to "auto-daub." The definition defines "sleep" to include both failing to cover and failing to claim a prize, however, the IGRA definition of bingo does not require a separate "claim" action by the play. To the contrary, the IGRA provides that the game is "won" by the first player to cover a game-winning pattern. The imposition of an additional claim requirement that is contrary to the IGRA requirements for bingo. There also is no legal basis for requiring that a player be permitted to "sleep" a bingo.

*Pull Tabs.* This definition would mandate that pull-tabs be made of paper or other tangible material. In other words, it would preclude the possibility of electronic pull-tabs. This is contrary to recent case law in Ninth and Tenth Circuit holding that electronic bingo cards are permissible.

*Instant bingo.* According to the NIGC, the game is functionally the same as pull-tabs; however, Congress listed them separately and therefore clearly intends that they be treated as separate games.

**Section 546.4- - Criteria for First Statutory Requirement- - 25 U.S.C. 2703(7)(A)(i)(I)**

*Card Standards.* While the rule would permit electronic cards, it states that the bingo game "shall fill at least ½ of the total space available for display." Proposed 546.4(b). However, it also provided that "[a]t no time shall an electronic card measure less than 2 (two) [sic] inches by two (2) inches or four (4) square inches if other than a square card is used." Proposed 546.4(b). These requirements are arbitrary, especially the requirement that ½ of the display space show the bingo game. In the preamble, the Commission explains that the card must be "clearly visible." However, as long as the card is clearly visible, there is no apparent justification for requiring that ½ of the display space show the bingo game. This requirement is particularly arbitrary since it was never deemed necessary in any of the advisory opinions or in any of the previous drafts of the rule, all of which indicated that a 2x2 inch card is clearly visible. Further, we note that many bingo minders (which allow players to play many cards at the same time) display individual cards that are smaller than 2x2.

The rule also would require that bingo be played with a traditional 5x5 card. Proposed 546.4(c). This is a dramatic change in position for the Commission, which has consistently taken

the position over the years that Congress did not intend to limit tribes to traditional bingo. It also is contrary to the MegaMania cases. According to the Commission, other card configurations could be permitted as games similar to bingo. While this might sound reasonable, tribes and the Commission have viewed games similar to bingo as permitting a much wider range of bingo-type games, including ones that do not meet all of the IGRA requirements for bingo. In effect, the Commission's proposal would limit games similar to bingo to games that have, until now, been considered to be bingo. This change would have a significant negative operational impact, since games similar to bingo can be played only in locations where bingo is played. 25 U.S.C. 2703(7)(A)(i).

*Display.* The rule also would require that Class II games prominently display in two inch letters a message that the game is bingo or a game similar to bingo. Proposed 546.4(d). It is unclear why this message is necessary, especially if the bingo game is clearly displayed on the video screen. We understand that this requirement was suggested by the Justice Department, but it is, in our view, an arbitrary and unnecessary requirement.

*Prize Limitations.* Further, the rule would impose significant limitations on prizes. The rule would prohibit "[r]andom or unpredictable prizes ... ." Proposed 546.4(g). According to the proposal, "[a]ll prizes in the game, except for progressive prizes, must be fixed in amount or established by formula and disclosed to all participating players in the game." Id. As further explained:

> All prizes in a game, including progressive prizes, must be awarded based on the outcome of the game of bingo and may not be based on events outside the selection and covering of numbers or other designations used to determine the winner in the game and the action of the competing players to cover the pre-designated winning patterns. The prize structure must not rely on an additional element of chance other than the play of bingo.

Proposed 546.4(n). In the preamble, the Commission clarifies that "the order of, or quantity of, numbers or other designations ... may affect the prize awarded for completing any previously designated winning pattern in a game." 71 Fed. Reg. 30,244. Bonus wheels and similar devices are common in Indian and non-Indian bingo halls and there is no indication that Congress intended to restrict this aspect of "traditional" bingo. The preamble then goes on to describe several prize features that would not be permitted – "stand alone progressives," "mystery jackpots," "gamble feature" and "residual credit removal." We see nothing in the IGRA, which simply requires that bingo be played "for prizes," that would preclude random or unpredictable prizes.

In addition, the proposal would require that the game-winning prize be awarded in every game and be "no less than 20% of the amount wagered by the player on each card and at least one cent." Proposed 546.4(j). We note that MegaMania, approved by the Ninth and Tenth

Circuits, did not require that the game-winning prize be awarded in each game. The 20% or one cent rule is completely arbitrary. The preamble provides no explanation as to how these amounts were determined by the Commission, which simply says that the prize "should have significant value."

Finally, the rule would distinguish between interim and consolation prizes, which the Commission recognizes can be awarded in addition to the game-winning prize. However, the rule would require that the ball release pause when enough balls have been released for the first potential game-winning pattern. Consolation prizes could only be awarded "after a subsequent release of randomly drawn or electronically determined numbers or other designations has been made." Proposed 546.4(l). However, these requirements would preclude games such as MegaMania from meeting the standard, since that game released balls in sets of three and did not pause if the first or second ball in the set were sufficient to achieve the game-winning pattern. As such, this requirement is arbitrary and unlawful.

**Section 546.5- -Criteria for Meeting Second Statutory Requirement**

In this section the NIGC continues its effort to limit bingo to its view of what is "traditional." Again, such requirements are contrary to the IGRA and should be removed.

*Pre-drawn Numbers.* The NIGC repeats its view (expressed in NIGC bulletins and advisory opinions) that games played with pre-covered or pre-drawn numbers (such as bonanza-style bingo) are not permitted to be played in an electronic format. The rationale, explained in the preamble, is that the term "when" used in the definition of bingo has a temporal meaning and requires that numbers be covered at the same time that they are drawn or determined. However, as in its previous guidance, the NIGC ignores the argument that when also has a conditional meaning (the player covers "IF" matching numbers are drawn or determined), even though the definition of "when" quoted by the NIGC in the preamble includes the conditional "IF" meaning. 71 Fed. Reg. 30,245. The NIGC is incorrect in its belief that games played with pre-drawn balls cannot be bingo or at least games similar to bingo, especially since such games are recognized as such under the laws of a number of states. Amazingly, the Commission acknowledges that bonanza-style can be played in "live session bingo play," 71 Fed. Reg. 30,245. There is no logical basis for the Commission's position that such games can be played in a "live" format, but not with electronic aids. Both forms are "live" bingo games.

*Auto-daub & Cover.* The rule also prohibits "auto-daub" and requires that players "must take overt action after numbers or designations are released." Proposed 546.5(e). Further, the rule would impose time requirements on the ball release and daub periods. According to the rule, players must be given at least two seconds to daub after the release of each set of balls. Proposed 546.5(i). The rule also would prohibit a player from catching-up and covering previously missed balls later in the game, even though this is permitted in almost every traditional bingo game. Proposed 546.5(j)-(l). An exception is made for the game-winning prize, but not for bonus or progressive prizes. There is no legal basis for any of these limitations.

In the case of auto-daub, the restriction is particularly unreasonable, since this feature is common in non-Indian bingo halls throughout North America.

*Substitute Players.* The NIGC asserts that "[t]he gaming facility or its employees may not play as a substitute for a player." Proposed 546.5(n). There is no real explanation for this limitation, which would be contrary to an advisory opinion issued by the NIGC on November 14, 2000, where it opined that "proxy play" (where facility employees covered the cards for the players) was permitted for Class II games. Thus, this limitation should be removed.

**Section 546.6- - Criteria for Meeting Third Statutory Requirement- - 25 U.S.C. 2703(7)(A)(i)(III)**

Proposed Section 546.6(a) sets forth a number of additional requirements, which are completely arbitrary and should be removed. We discuss these provisions below.

*Ball Release &Game Winning Pattern.* The rule sets forth ball release requirements that appear to be intended to slow game play. According to the proposal, the game must: (1) provide for at least two releases of bingo numbers, (2) each release must take at least two seconds, (3) the bingo numbers must be displayed one-at-a-time, and (4) the first release cannot contain more than "one less than the number required for the game-winning pattern." Proposed 546.6(c)-(d). The rule has a number of further restrictions on the play of bingo and similar games. According to the rule, each game can have only one game-winning pattern, the winning pattern must have at least three spaces, and bonus patterns must have at least two spaces. Proposed 546.6(e)-(f). There is no legal basis for these limitations.

In contrast to previous NIGC proposals, the Commission now agrees that the first release of bingo numbers "may contain the numbers or other designations necessary to form other winning patterns for bonus or progressive prizes." Proposed 546.6(h). However, the second release "may not extend beyond the quantity of numbers or other designations necessary to form the first available eligible game-winning pattern on a card in play in the game." Id. Significantly, no prize can be claimed (even bonus prizes won during the first release) until at least two ball releases have taken place. Proposed 546.6(i). This rule is contrary to the way games such as those approved by the courts (MegaMania) are played and is contrary to law.

*Ante-up rules.* The draft rules would prohibit the "ante-up" style of game approved in the MegaMania cases. While NIGC concedes that ante-up games are permitted, it proposes game rules that are contrary to the game features approved in the MegaMania cases. Specifically, the game requires that at least two players must agree to ante-up. If not, the last player "will be declared the winner of the game-winning prize, and the game will end, provided that player obtains and covers (daubs) the game-winning pattern." Proposed 546.6(k). There is nothing controversial about awarding the game-winning prize to the last player if he/she covers the pattern. However, the NIGC then proposes the absurd requirement that "[i]f all players leave the game before a game-winning pattern is obtained and covered (daubed) by a player, the game

will be declared void and wagers returned to the players." Id. (emphasis added). Apparently, all players would get a full refund even if they had paid and played multiple rounds, but had dropped out before a player covered the game-winning pattern. On its face, this would appear to require refunds, even if the players had won interim prizes during earlier rounds of the ante-up game! Such a requirement would be at odds with the MegaMania cases and would be impractical.

*Sleep.* Proposed 546.6(n) provides that if a player sleeps the game-winning pattern "[t]he same value prize must be awarded to a subsequent game-winning player in the game." Thus, if there are two players in the game (one at a 5 cent buy-in level and one at a $5 buy in level) and the player at the higher level fails to cover the game-winning pattern, then the rule would require that the 5 cent player win the prize from the $5 level if he/she covers the game-winning pattern. We are not aware of any "traditional" bingo game that is played under such an unfair and arbitrary rule. The prize should be based on the prize table for the individual player's buy-in level.

**Section 546.7- - Criteria for Non-Electronic or Electromechanical Facsimiles Pull-tabs or Instant Bingo**

This section reflects the NIGC's view that pull-tabs must be made of paper or other tangible material in order to avoid being an electronic or electromechanical facsimile. While the NIGC agrees that a technologic aid may "read and display the contents of the pull-tab as it is distributed to the player" the proposed rule would not permit the device to validate the pull-tab or otherwise accumulate credits. We understand that this change was requested by the Justice Department, however, there is no rationale provided in the proposed rule for why such a feature would be not allowed for a Class II aid device. Also at the request of the Justice Department, the rule would require that the aid device display in two inch letters – "THIS IS THE GAME OF PULLTABS." Finally, the rule would limit the size of the print on the pull-tab to eight point font. Once again these requirements are arbitrary and contrary to law. These restrictions are not supported by law and should be removed.

**Section 546.8- -Pull-tabs or Instant as Electronic or Electromechanical Facsimile**

The rule would prohibit pull-tab systems where paper pull-tabs are electronically read at a central location and the results transmitted to individual player stations. The NIGC provides no real justification for this limitation, except for a general unwillingness to allow any feature that was not expressly permitted favorable in recent pull-tab cases. There is no legal basis for this limitation, which should be removed.

**Section 546.9 - - Approval Process for Games**

The entire approval process is fundamentally flawed, since it fails to respect the primary role of tribal regulators under the IGRA. For example, there is no ability under the proposed rule for a tribe or vendor to appeal a negative decision by the testing laboratory. This is contrary to fundamental due process. Further, the proposed rule would require advance certification by an independent testing laboratory recognized by the Commission before a game could be put in play. According to the proposed regulations, the Chairman of the NIGC or his designee would have 60 days to "interpose an objection to any certification issued by a testing laboratory ... ." Proposed 546.9(e). However, even after 60 days, the Chairman or his designee is permitted to object to a previously certified game "upon good cause shown." Proposed 546.9(e)(2). In other words, there never would be any certainty about a game classification decision. It likely would be impossible for a vendor to operate and raise capital in such an uncertain regulatory environment.

**Section 546.10- - Compliance with Part 546 Standards**

The rule would provide a transition period for tribes to bring their games into compliance. According to the proposal, "[f]or Class II gaming operations open on the effective date of this part or that open within six months of the effective date, certification [of the games] must be completed and authorization provided by the tribal gaming regulatory authority within six months of the effective date." Proposed 546.10(e)(1). It is unrealistic to develop, test, have certified and install tens of thousands of Class II games within six months of the final rule.[7] The transition period should be at least 18, if not 24, months.

3. Comments on Technical Standards.

In proposing regulations that will create what is described as "a comprehensive regulatory scheme over Class II gaming," the NIGC has stated that its goal is to assure "that gaming is conducted fairly and honestly" and has said it believes the Commission must issue Technical Standards for electronic devices to promote the integrity and security of the equipment in Class II gaming. 71 Fed. Reg. 46336 (Aug. 11, 2006).

We agree that Technical Standards are an effective mechanism for achieving fairness and honesty in game play and device integrity. However, as proposed, the Technical Standards would result in unnecessary expense and economic hardship on tribes and manufacturers.[8] The proposed

---

[7] We understand that there are presently over 50,000 electronic Class II games in play.

[8] Arguably, many of the proposed technical standards requirements go far beyond what even heavily regulated states like Nevada place on non-Indian games. *See* State of Nevada, Regulation 14.050, March 2006 (revised) and Nevada Gaming Commission and State Gaming Control Board, §§1.010 et seq., "Technical Standards for Gaming Devices." Further, the framework and structure of the proposed regulation encompasses incredible detail concerning the internal working of devices that greatly exceed even those standards typically used by regulatory agencies to ensure game fairness for non-Indian gaming and Class III devices under Tribal-State compacts.

Technical Standards should be withdrawn and significantly revised based on input from tribes and manufactures.

We note that the NIGC did not hold consultation sessions with tribes on the proposed Technical Standards. In fact, the proposed Technical Standards were not published in the Federal Register until after the conclusion of the NIGC's regional consultation sessions. This failure to consult with tribes concerning such an important regulation is in direct violation of the NIGC's own consultation policy. Unfortunately, this lack of consultation has, in part, led to a proposed rule that contains numerous shortcomings. We call on the NIGC to honor its consultation policy and conduct meaningful consultation with tribes concerning this proposal. It is our hope that reasonable technical standards can be developed that will help to protect tribes and the gaming public.

While we hope that the NIGC will withdraw the proposed rule for further consultation and refinement, below we list some of our specific comments and concerns.

**Section 547.6(d)** - Most of the information listed here is generally stored on the client device and not the server. For example, most manufacturers only record the following data on the server: final game result, including progressive prizes awarded and, for bingo, game number and numbers or designations drawn, in the order drawn.

**Section 547.6(e)** - Most manufacturers in the United States do not record any of the listed significant events on the server.

**Section 547.6(e)(19)** – The phrase "aborted game" should be defined.

**Section 547.7(m)(3)** - This standard is not appropriate. There is no method guaranteeing that a failed door switch will register as an open door. Any door can be simulated as "closed" once opened (a cheater can attach his/her own optics or simulate a door being closed).

**Section 547.7(q)(4)(i)** – The regulation should clarify that side mount bill acceptor units are permitted.

**Section 547.10(c)(4)** – This rule should also apply for printers.

**Section 547.11(b)(1) & (2) and Section 547.11(d)(1)(i) & (ii)** – Not all manufacturers maintain multiple copies of data as part of their critical memory. Some manufacturers may use a CRC signature to validate their data and not use multiple copies. It is inappropriate for the NIGC to require a manufacturer to only use one predefined type of critical memory integrity checking.

**Section 547.11(c)(1)** - The requirements listed above are excessive. As far as we know, there are no class III gaming jurisdictions that require the critical memory to be checked after Bill Input, Cashless Transfers, Vouchers Printed, or Vouchers Redeemed. Also the requirement for a critical memory check before AND after a game play is excessive, as the critical memory checks

only need to be done on game start for the few domestic jurisdictions (less than 10) that require this.

**Section 547.11(d)(4)** - A processor can only be swapped out from a powered down state and only after the machine has been accessed. Additionally, many processors may be physically and logically identical to each other and there will be no possible way for a program to recognize the replacement has taken place. We recommend that "security tape" be placed over removable Microprocessors, RAM, and other electronic components involved in the operation, calculation, or determination of game play and game results.

**Section 547.11(e)(3)** - This requirement is not recommended and should be removed. Gaming devices and their critical memory are often stored in a manner that is not "fault" tolerant. Any gaming device that has suffered critical memory failure has had its data corrupted. It would not be recommended that the gaming machine even attempt to determine what records are still viable and which are corrupted, because corrupted data could be used to perform this evaluation.

**Section 547.11(f)(3)** - This requirement is excessive. There are some configuration settings that can be changed after a critical memory reset that are NOT normally required to be secured. For example, hopper limits, printer limits, printer settings, attraction modes, etc. Also this rule does not make any provision for manufacturers that have a secured method (such as a set chip) of making certain specific configuration changes after a critical memory reset.

**Section 547.13(a)(1)(iii) and Section 547.7(s)(3)** – It generally is not possible to know if the coin diverter has physically failed.

**Section 547.14(a)(2)** – This requirement should be modified to permit a text, rather than graphical, representation of the game in the game recall.

**Section 547.14(b)** - Items #5 through #8 of this requirement are excessive. Accounting meters are already recorded elsewhere on the device. Additionally, the other items generally have their own recall as specified elsewhere in the regulations. It would be redundant to require a manufacturer to display ALL of this information on a game recall screen.

**Section 547.17** - We ask that there be a complete review of the FAC concept in its entirety as it is implemented here. It is not used anywhere else in this form and we question the security when compared to other methods of software validation currently in use today.

**Section 547.17(a)(1)** - The required files to be on the FAC document are excessive. Any files, scripts, procedures, etc. not involved in the operation, calculation, display, or determination of game play and game results are generally not required to be controlled.

**Section 547.17(b) and Section 547.17(c)** – We are advised that many testing laboratory verification tools (which are accepted as third party verification programs by class III gaming

jurisdictions) do not have the ability to use a seeding methodology. Requesting a manufacturer to support this is excessive.

**Section 547.23(a)(1)** –This rule would require encryption whenever communications traverse public areas. Since the entire gaming floor is a public area we recommend that this be re-worded to reflect that encryption be used whenever the communications leave the physical building and that in-house communications be secure from other networks and servers in public areas.

**Section 547.23(a)(5)** - Items (v) through (viii) are typically transmitted via the communication protocol of the host accounting system which is not normally encrypted.

**Section 547.23(b)(1)** – We recommend that specific types of encryption algorithms not be listed, as it is possible that one of 'demonstrably secure' algorithms could be broken in the future. Additionally, there may be more secure encryption algorithms developed in the future, but they would not be listed here as a 'demonstrably secure' algorithm.

Conclusion

For the reasons detailed above, the Seminole Tribe of Florida respectfully urges the Commission to withdraw the proposed Class II regulations and take a fresh look at the classification issue after completing work on reasonable technical standards regulations, which must be developed in accordance with the Commission's consultation policy.

Sincerely,

Ron Holzman for Jim Shore

Jim Shore
General Counsel

JS/abm
cc: Penny Coleman, Acting General Counsel
National Indian Gaming Commission

Jerry Straus, Esq.

jsphcnigcclassIIcomments11-13-06.ltr